

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH TRUMBULL,

Plaintiff-Appellant,

v

BATTLE CREEK HEALTH CARE SYSTEMS,
a/k/a BATTLE CREEK HEALTH CARE, and
BATTLE CREEK COMMUNITY
HOSPITAL.

Defendants-Appellees.

UNPUBLISHED

April 19, 2002

No. 234738

WCAC

LC No. 00-000416

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the opinion and order of the Worker's Compensation Appellate Commission (WCAC) affirming the magistrate's award of benefits for a closed period. We affirm.

Plaintiff suffered a back injury on June 15, 1987, while working as a surgical nurse. Two weeks after the injury, she returned to work without restrictions and was able to work from January 1988 to December 1988 without missing a shift on a more demanding schedule. In mid-1988, on a job transfer application form, plaintiff indicated that she was not suffering from any limitation on her ability to perform her work. However, she claimed that in December 1988 her back problems resurfaced and by January 10, 1989, she was no longer able to work.

In August 1990, plaintiff filed a claim for worker's compensation benefits in which she claimed two injury dates: June 15, 1987 and a last day of work injury of January 10, 1989. Initially, the magistrate granted plaintiff an open award of benefits on the basis of both injuries. However, in an opinion issued July 9, 1992, the WCAC found that plaintiff failed to prove a work-related injury existing on her last day of work. The commission remanded the case to the magistrate specifically for a determination of residual wage earning capacity. On remand to the Board of Magistrates, plaintiff's employer filed a petition to stop benefits.

Following a second hearing on October 11, 1994, the magistrate granted plaintiff an open award of benefits on the basis of the June 15, 1987 injury date and denied the petition to stop, concluding that there was no evidence that plaintiff's condition had changed since the first trial. Defendants presented the testimony of a rehabilitation specialist, who stated that there were

currently nine employers who were hiring for nursing positions within plaintiff's restrictions at wages higher than what plaintiff was making when she was injured. Applying *Sobotka v Chrysler Corp (After Remand)*, 447 Mich 1; 523 NW2d 454 (1994), and *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57; 523 NW2d 444 (1994), the magistrate concluded that in the absence of any evidence demonstrating that plaintiff had refused an actual offer of employment, evidence of potential employment was merely a statement of what plaintiff would hypothetically be able to earn; such speculation, he determined, was barred by the Supreme Court's decisions in *Sobotka* and *McKissack*.

Following remand, the commission again reversed, finding that the magistrate had misinterpreted the relevant case law by requiring defendant to demonstrate actual jobs offered and rejected by plaintiff. Applying *Sobotka, supra*, to the facts in this case, the commission concluded that "in light of the evidence already available at the time of the first hearing, and the supplementary information subsequently established pursuant to our remand order, we believe that the record as a whole demonstrates that plaintiff had a wage earning capacity on May 8, 1991 exceeding her pre-injury average weekly wage."

The WCAC noted that "[n]o objective, physical explanation was provided as to why plaintiff was fully able to work in 1988, but, without any objective signs of physical change in her condition, was no longer able to do the same for the entire period from 1989 through the date of the first hearing." It also noted that all the medical experts were unable to find evidence of any objective condition that would have explained plaintiff's symptoms, and discounted plaintiff's doctor's testimony for this reason. Accordingly, the commission modified the magistrate's decision to provide for a closed award of benefits ending May 8, 1991, the date of the first hearing.

Plaintiff's application to this Court for leave to appeal from the decision was denied for lack of merit. However, in an order entered May 28, 1998, the Supreme Court remanded the case for consideration as on leave granted in light of its decisions in *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997), and *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896 (1997). On remand, this Court vacated in part, reversed in part, and remanded the case to the magistrate for further factual findings. *Trumbull v Battle Creek Health Care Systems*, unpublished opinion of the Court of Appeals, issued August 13, 1999 (Docket No. 212058).

By the time the matter reached the magistrate, the Supreme Court had decided *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000), in which it reversed *Goff, supra*, and held that the commission has the authority to make independent factual findings where those of the magistrate are not supported by competent, material and substantial evidence. After noting that the Supreme Court's decision in *Mudel, supra*, rectified at least one of the errors identified in this Court's opinion, Magistrate Kenneth L. Block adopted the WCAC's previous opinion as his own.

Plaintiff appealed the decision to the commission, arguing that the magistrate failed to adhere to this Court's instructions on remand and failed to properly apply the law. The WCAC concluded that the factual findings that had been made in the case were supported by the requisite competent, material and substantial evidence and that the decision was consistent with *Haske, supra*. The commission stated:

The facts as found show that, even if plaintiff remained partially disabled, she had the extensive ability to perform work in the broad field of nursing. Plaintiff's back complaints had stabilized by May 8, 1991, and there was no objective evidence to support plaintiff's complaints. Information about the availability of numerous jobs plaintiff was able to perform in her field could have been appropriately presented. Expert testimony established the existence of actual jobs with identifiable pay scales. There were between 60 and 103 job openings for plaintiff in her locality, but plaintiff failed to engage in an effective job search, because she made the decision to go to school. At the time of hearing, plaintiff was a full-time student. The fact finder could conclude that plaintiff was not entitled to benefits where her unemployment was due to factors other than the work injury, such as voluntarily leaving the job market.

Accordingly, the commission affirmed the magistrate's decision with regard to both his factual findings and legal analysis.

Plaintiff raises two issues on appeal. First, she argues that the commission's opinion is not supported by any evidence in the record and that it failed to comply with this Court's remand order because it did not address the issue of whether plaintiff's wage loss was due to something other than her work related injury. Second, she asserts that the commission's decision is inconsistent with *Haske, supra*, because it was based on her residual wage earning capacity in the broad field of nursing, even though plaintiff is disabled from performing her past nursing positions.

Judicial review of decisions of the Worker's Compensation Appellate Commission is limited to whether the commission applied the correct legal standard and whether there is any evidence to support its factual findings. MCL 418.861a(14); *Mudel, supra*; *Michales v Morton Salt Co*, 450 Mich 479, 485; 538 NW2d 11 (1995); *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992). However, questions of law involved in any final order of the WCAC are reviewed de novo. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

The salient point in this case is the commission's original finding that plaintiff failed to prove a last day of work injury. This finding has never been challenged on appeal. It is undisputed that plaintiff was able to return to full-time regular employment as a surgical nurse after her first injury and worked without missing a shift for approximately a year. On the first remand, although the commission phrased its instructions to the magistrate in terms of making a determination regarding "residual wage earning capacity," what it meant by this was that the magistrate was to determine the extent to which plaintiff's wage loss was attributable to the first injury. Rather than doing this, however, the magistrate concluded, based on a misapplication of the law, that he could not disturb the first magistrate's findings because there had been no change in plaintiff's condition.

On the second appeal, the WCAC, in its September 23, 1994 opinion, made the factual findings that the magistrate failed to make and determined essentially that plaintiff was not disabled because there were no objective findings supporting her claim of a back injury. Alternatively, even if plaintiff had a disability, it did not impact her earning capacity as a nurse, since even her own treating physician would have imposed only minimal restrictions.

Accordingly, the commission found in both its September 1994 and its May 2001 opinions that plaintiff had no work related disability or that, even if she was partially disabled from some other cause, she had voluntarily removed herself from the workforce as of the date of the first hearing.

As the commission noted, the Supreme Court held in *Mudel, supra*, that the commission has the authority to make its own findings of fact where those of the magistrate are insufficient. Plaintiff does not challenge this principle, but rather argues that there is a complete lack of evidentiary support in the record for the commission's factual findings that: (1) she was a full-time student at the time of the May 1991 hearing and (2) her back problems had resolved by the time of the hearing. Even assuming that the commission erred with regard to plaintiff's student status at the time of the May 1991 hearing, the question is more accurately phrased as whether there was any evidence in the record to support the commission's ultimate finding that plaintiff had voluntarily removed herself from the workforce as of May 1991. That plaintiff continued to work without a problem for eighteen months after the initial injury, coupled with the commission's findings that there was no last day of work injury proven and no objective evidence of injury, is sufficient to affirm the WCAC's finding in this regard. The same evidence compels us to affirm the commission's finding that plaintiff's back problems had resolved by the time of the May 1991 hearing.

Plaintiff contends that she could not have voluntarily withdrawn from the workforce because she never refused reasonable employment, and asserts that she is therefore entitled to compensation under the Supreme Court's holding in *Perez v Keeler Brass Co*, 461 Mich 602; 608 NW2d 45 (2000). However, *Perez* is irrelevant in that the issues in this case concern whether plaintiff is compensably disabled, not whether she refused an offer of reasonable employment. Questions relating to the refusal of reasonable employment or voluntary withdrawal from the workforce become relevant only after it has been established that a claimant is partially disabled from a work-related injury.

In this case, there is evidence in the record to support the commission's finding that plaintiff recovered from her first injury in June 1987. There was never any evidence presented to relate her sudden inability to work to her previous injury, or to explain why there was a sudden and dramatic change in her condition after she had worked full time without restrictions for over a year. The commission's finding that plaintiff failed to prove a last day of work injury was affirmed in this Court's previous opinion and is therefore conclusive under the law of the case doctrine. In the absence of a finding of a subsequent work-related injury, plaintiff has failed to demonstrate the existence of a compensable disability under *Haske, supra*. Accordingly, plaintiff's claim that the commission misapplied *Haske* is without merit.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra